

STATE'S RESPONSE TO DEFENDANT'S REQUEST FOR ADDITIONAL DISCLOSURE AND DEFENDANT'S SUPPLEMENTAL MOTION FOR ORDER COMPELLING DISCLOSURE

When nothing suggested that the victims were in any way responsible for the car crash, the defense was not entitled to any information about the victims' possible alcohol intake. The defense was not entitled to the victims' medical records under Rule 15.1(a)(7), Ariz. R. Crim. P., as "material or information . . . which would tend to reduce the defendant's punishment" on a theory that the defense needed the victims' medical records to determine the validity of their request for restitution, because restitution is not punishment.

The State of Arizona, by and through undersigned counsel, requests the Court to deny the defendant's request for additional disclosure and deny the request for an order compelling disclosure, for the reasons set forth in the following memorandum of points and authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

FACTS:

On December 24, 1993, approximately 2:55 a.m., the defendant was driving eastbound on Thomas at 36th Street. Her vehicle swerved left of center, drove partially into the westbound left turn lane, and struck a stopped vehicle that was waiting to turn. The driver of the stopped vehicle, Angela Fields, suffered injuries including chest bruising, separation of cartilage from her sternum, dizzy spells, pains in her back and neck, and liver problems. One of Angela's passengers, Wendy Penhollow, suffered a head laceration, a broken nose, back strain, torn ligaments, and broken teeth requiring extensive dental work. The other passenger, Daniel Penhollow, was critically injured. He was immediately taken to surgery to remove a portion of his damaged spleen. He also had two collapsed lungs, broken ribs, and a broken clavicle.

The defendant was transported to a medical facility with minor injuries. Blood was drawn from the defendant at the hospital and the results showed a BAC of .16%.

LAW:

The defendant is requesting that the State advise her of what the victims' testimony will be. Specifically, the defendant asks for information as to what the victims will say regarding the details of the collision; whether the victims saw the defendant's vehicle coming straight at them; and whether their vehicle was moving or stopped. The defendant also asks to be informed if Angela Fields had consumed any alcoholic beverage that would influence her driving. The defense also demands any statements made by the Penhollows to the Phoenix Police tending to show that Angela Fields may have contributed in any manner to the accident. Further, the defendant demands the Penhollows' financial claims for restitution against the defendant, their medical records, and, finally, the adult probation department's complete file on the presentence report. The defendant states that this request is not covered by the Victims' Bill of Rights.

The State disagrees because the defendant is attempting to circumvent the victims' rights to refuse any discovery request from the defendant. Under Article II, § 2.1(A) of the Arizona Constitution, a victim has the right to refuse any discovery request "by the defendant, the defendant's attorney, or other person acting on behalf of the defendant." In *State v. Warner*, 168 Ariz. 261, 264, 812 P.2d 1079, 1082 (App. 1990), the Court of Appeals held that the Victims' Bill of Rights does not affect the defendant's right to confront and cross-examine witnesses because the defendant can fully exercise that right at trial. The Court of Appeals held, "the right to interview or depose a victim under Rule 15 [of the Arizona Rules of Criminal Procedure] is clearly procedural in

nature.” The Court further held that the exercise of the victim’s constitutional right to refuse an interview does not impair any of the defendant’s substantive or vested rights. *Id.* The Court concluded that the Victims’ Bill of Rights did not deprive the defendants of due process or the right to fundamentally fair proceedings. *Id.*

In *State v. O’Neil*, 172 Ariz. 180, 836 P.2d 393 (App. 1991), the Court of Appeals granted relief from the trial court’s order requiring the State to record all conversations with the victims and to provide defense counsel with transcripts of those conversations. The defendant argued that the order was within the trial court’s discretion and that it protected his fundamental right to a fair trial. In vacating the trial court’s order, the Court of Appeals, citing *Warner*, *supra*, held:

After *Warner*, it should be clear that the Victim’s Bill of Rights abrogated a defendant’s right under Rule 15 to *interview or otherwise seek discovery* from an unwilling victim.

O’Neil, 172 Ariz. at 182, 836 P.2d at 395 [emphasis added].

In *Knapp v. Martone*, 170 Ariz. 237, 823 P.2d 685 (1992), the Arizona Supreme Court encouraged trial courts to follow the plain language of the Victims’ Bill of Rights and not to create exceptions:

It is important to emphasize that Arizona courts must follow and apply the plain language of this new amendment to our constitution. If trial courts are permitted to make *ad hoc* exceptions to the constitutional rule based upon the perceived exigencies of each case, the harm the Victims’ Bill of Rights was designed to ameliorate will, instead, be increased. Permitting such *ad hoc* exceptions will encourage defendants or others to assert that the person designated as the victim should, instead, be considered a suspect.

Knapp at 239, 823 P.2d 687.

In her motion, defendant cites *State ex rel. Romley v. Superior Court [Ann Roper. Real Party Interest]*, 172 Ariz. 232, 836 P.2d 445 (App. 1992). Under the unusual fact situation in *Roper*, the Court of Appeals did not follow *Warner* and *O'Neil* in holding that the Victims' Bill of Rights abrogated a defendant's right to interview or otherwise seek discovery from an unwilling victim. In *Roper*, the court held that when the defendant's constitutional right to due process directly conflicts with the Victims' Bill of Rights, then due process is the superior right.

The unique factual circumstances in *Roper* are easily distinguishable from those in this case. In *Roper*, the defendant called 911 and reported that her husband, the victim, was beating her and threatening her with a knife. When police arrived, they found the husband bleeding from a stomach wound. The defendant was charged with aggravated assault. The defendant filed a motion to require the victim to make available for copying all his past and present medical records from any institution in any jurisdiction. The motion alleged that the victim had severe mental problems and had been receiving treatment for "multiple personalities" for years. The motion alleged that the defendant, in stabbing the husband, was acting in self-defense after one of his multiple personalities had attacked her. The victim had been arrested three times and convicted once for assaulting the defendant. The trial court in *Roper* granted the motion for production of all records, ordering that the records be produced for in-camera inspection solely on the issue of multiple personalities. The State filed a special action. The Court of Appeals granted partial relief, ordering the trial court to find portions of records relevant to self-defense and portions of records relevant to the victim's ability to recall and relate the events accurately.

The Court of Appeals further held that there was “sufficient evidence presented by the defendant to raise self-defense and put the burden of proof on the State to overcome the defense.” *Id.* at 238, 836 P.2d at 451. The Court noted that the evidence included the undisputed allegations that the victim had prior arrests and one prior conviction for domestic violence towards the defendant. The Court also noted that the victim suffered from a mental illness that predisposed him to violent behavior, and in the transcript of the “911” call, the defendant asked for help because her husband was beating her and threatening her with a knife. *Id.*

Roper is distinguishable from the instant case because the defendant here has not and can not, present any evidence that her due process rights conflict with the Victims’ Bill of Rights. The defendant has presented no evidence that the victim was intoxicated. Even if the victim had been intoxicated, the relevance of such information at trial is questionable because no evidence exists placing any fault for this collision on the victim.

In *Roper*, the Court of Appeals held that the defendant had presented sufficient evidence to raise self-defense and to put the burden of proof on the State to overcome the defense. In the instant matter, the defendant has not made any factual showing establishing any defense that would place the victims’ possible intoxication at issue. Therefore, *Roper* does not control the issue in this case.

In addition, there is no evidence to suggest that the presence of alcohol in any of the victims’ blood is in any manner relevant or material to any issue to be decided in this case. This evidence should be deemed inadmissible based upon Rules 401, 402, 403 and 103(C), Arizona Rules of Evidence. Evidence is relevant if it tends to make the

existence of any fact of consequence more or less probable. Rule 401, Ariz. R. Evid. In *State v. Krantz*, 174 Ariz. 211, 848 P.2d 296, (1993), the Court denied admission of evidence of methamphetamine in the victim's system, stating that the Court failed to see how the victim's ability to perceive would have assisted in the defense. The evidence was clearly irrelevant and was not evidence essential to the case.

In this case, Angela Fields's vehicle was lawfully stopped waiting to turn left. There was no indication that Angela Fields had consumed alcohol. Neither paramedics, officers at the scene, nor medical personnel made any statement that any of the victims had an odor of alcohol or appeared under the influence. As in *State v. Krantz, supra*, where the injuries caused by the defendant were clear and unrelated to any pre-existing circumstances, the issue of Angela Fields's possible alcohol consumption will not assist in any defense. Any evidence offered in this case that any of the victims may have had any blood alcohol content should be deemed irrelevant and precluded from this trial.

The Penhollows have made no exculpatory statements to the State. The defendant has interviewed all of the police personnel involved that the State intends to call at trial. Thus, the defense should already have notice of any contact between the Penhollows and police.

The defendant requests the financial basis for the Penhollows' claim for restitution against the defendant, and bases her claim to this information under Rule 15.1(a)(7), Ariz. R. Crim. P. That Rule states in part:

All material or information which tends to mitigate or negate the defendant's guilt as to the offense charged, or which would tend to reduce the defendant's punishment.

Restitution is not punishment. *Matter of the Estate of Vigliotto*, 178 Ariz. 67, 870 P.2d 1163 (App. 1993); *State v. Freeman*, 174 Ariz. 303 848 P.2d 882 (App. 1993). Its purpose is to make the victim whole, not to punish the defendant. *State v. Howard*, 163 Ariz. 47, 785 P.2d 1235 (App. 1989). The State does not have possession or control of any of the requested records regarding the Penhollows' restitution claim and is under no obligation or duty to produce them for the defense.

The State will provide the defendant with the Adult Probation Department's report prepared by William Harkings that was given to our office.

The State requests the Court to deny the defendant's request for the Penhollows' medical records from Good Samaritan Medical Center and Maricopa Medical Center. In the alternative, the State asks the Court to examine the Penhollows' medical records *in camera* to identify portions of records relevant to the victims' ability to recall and relate the events accurately. The defendant claims that the records are necessary for the State to prove that the injuries sustained are indeed serious, but this claim does not hold water. The victims' testimony will establish the nature of the injuries they sustained. It should be left to the trier of fact to determine if the testimony satisfies the definition of "serious" physical injuries.

CONCLUSION:

For the foregoing reasons, the State requests that the Court deny the defendant's request for additional disclosure and order compelling disclosure.